Supreme Court, U.S.
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CLERK

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No. 96-1277

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1996

WILLIAM BRANCH

Petitioner,

-v-

TOWER AIR, INC., STEPHEN L. GELBAND, MORRIS K. NACHTOMI, GOLDMAN SACHS & CO., LEHMAN BROTHERS. INC. and MORGAN STANLEY & CO. INCORPORATED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

This reply is submitted in response to the new argument raised in the respondents' briefs in opposition to the petition for certiorari.

ARGUMENT

In the petition, the issue presented for review was whether the adequacy requirements under the Constitution and Rule 23 Fed. R. Civ. Proc. were satisfied. Respondents did not respond to whether that issue is appropriate for review by this Court. Instead, they urge arguments such as that the standard for review of a class settlement is not in dispute, that the Court below complied with that standard, and that the Court below had found that the representation of the class was adequate.

This Court is not foreclosed from and should review the propriety of the determination of the adequacy of representation when, as here, there is a conflict between the ruling of the Third Circuit in *In Re General Motors Corp. Pick-up Truck Fuel Tank Products Liability Litigation,* 55 F.3d 768, 786 (3d Air. 1995) on this issue and that of the Second Circuit in this case. Recently, in *Richards v. Jefferson County,* U.S. , 116 S. Ct. 1761, 1765 (June 10, 1996) this Court in reversing the determination of the Alabama Supreme Court that petitioners "were adequately represented in the Bedingfield action" considered "the propriety of that determination". This Court in reversing that determination held:

> We recognized the "familiar doctrine . . . that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, or . . . the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter." Hansberry, 311 U.S. at 42-43. We concluded, however, that because the interests of those class members who had been a party to the prior litigation were in conflict with the absent members who were the defendants in the subsequent action, the

doctrine of representation of absent parties in a class suit could not support the decree.

(U.S. at , 116 S.Ct. at 1767)

Here, the respondent plaintiff had acknowledged that he never had any interest in pursuing any of the core claims that were settled in this settlement class action.[J758][1]

The very record the court below relied upon to justify the settlement was tainted because respondent-plaintiff made no attempt to pursue those claims. The only discovery conducted with respect to the core claims was taken after the adversarial mode had terminated and the parties were seeking to create a settlement record.[J769,J779] In *Saylor v Lindsley*, 456 F.2d 896, 899 (2d Cir. 1972) the Court in reversing a settlement had observed that the discovery record was "designed to justify a settlement rather than as an aggressive effort to ferret out facts helpful to prosecution of the suit".

CONCLUSION

For the reasons set forth above and in the petition, the petition should be granted.

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March 24, 1997

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[1] This and similar references preceded by the letter "J" are to the Joint Appendix in the Court of Appeals.